IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: May 14, 2007

\+ **CP No.82/2006**

Focus Management Consultants Pvt. Ltd. ..... Petitioner
Through: Mr.Neeraj Chaudhary and
Mr.Biju Mattam, Advocates

Versus

Second Foundation India Pvt. Limited ..... Respondent
Through: Mr.Sandeep Prabhakar and
Ms.Prerna Mehta, Advocates.

CORAM :-
*** HON'BLE MR. JUSTICE ANIL KUMAR**

1. Whether reporters of Local papers may be allowed to see the judgment? YES
2. To be referred to the reporter or not ? YES
3. Whether the judgment should be reported in the Digest? YES

ANIL KUMAR, J.

*****

1. This order shall dispose of petitioner's petition under Section 433(e) read with Section 434 and 439 of the Companies Act, 1956 for winding up of the respondent company and for appointment of Official Liquidator as the provisional liquidator in respect of the affairs and assets of the respondent company and for restraining the respondent company from

disposing of transferring, selling, alienating or parting with its assets in any manner whatsoever.

2. The petitioner contended that company was established for the purpose of developing and sourcing manpower by recruiting, educating and employing, bringing up and giving intensive training to professionals in various disciples of manufacturing and service related to information technology, marketing, accounting and other services and to act as consultant for recruitment services and to provide recruitment solutions and various other services.

3. According to the petitioner, respondent company was incorporated at Delhi and is having its registered office at Bombay House 4/47, Safdarjung Enclave, New Delhi. According to the petitioner, respondent company is indebted to the petitioner company for a sum of Rs.3,66,416/- together with interest at the rate of 16% per annum from 31st March, 2005 till the date of filing of the petition.

4. It is contended by the petitioner company that some time in November 2004, the petitioner company made arrangements and conducted a series of interviews and selected required candidates for recruitment in the respondent company on specific requests made by Mr.Radhakrishnan, Managing Director (Europe) and Mr.Ravi Grewal. According to the petitioner, the fee structure for its services was communicated to the respondent company and as it was not protested or refuted, is deemed to have been admitted. The petitioner carried out the recruitment process and short listed three candidates, Mr. Anand Joshi, Mr.Rami Reddy and Mr.Harsh Bhatnagar for the respondent company.

5. The persons recommended by the petitioner company were appointed by the respondent company in a project at Prague, Czech Republic, and appointments letters were issued and appointments were made and copies of which have been produced by the petitioner. The plea of the petitioner company is that since the respondent company was fully satisfied, the petitioner was again asked to initiate the process for recruiting more personnel for the respondent company at Chandigarh and on such request being received by the petitioner company, process of

short-listing was initiated and two candidates, namely, Ankur Aggarwal and Mr.Uday Aggarwal were recommended and appointment letters were also issued to them.

6. The petitioner claims the amount on the basis of invoices dated 16th February, 2005 which were in respect of Mr.Ankur Aggarwal, Mr.Harsh Aggarwal and thereafter the petitioner company sent other invoices dated 23rd February, 2005 for the recruitment of Mr.Uday Kumar, Mr.Rami Reddy and Mr.Anand Joshi. According to the petitioner, these invoices were accepted by the respondent without any protest, therefore, the amount of the invoices is deemed to have been accepted . The respondent has failed to pay the amount of Rs.3,66,416/0 with interest @ 16% per annum from 31st March, 2005. The notice of demand sent to the respondent company was received by its office at New Delhi, however, no reply was received and thereafter the petition has been filed by the present petitioner. Contending that the respondent company is commercially insolvent and unable to pay its debt and, therefore, it is liable to be wound up and it would be just fair and equitable in the facts and circumstances to wind up the respondent company and it has also been prayed for

appointment of Official Liquidator as the Provisional Liquidator in respect of assets of the company.

7. The petition was opposed by the respondent contending *inter alia* that there was no written or oral agreement agreeing to pay commission at the rate of 12.5% on annual gross and for payment of interest on any amount or on the late payment. According to the respondent the rate of 12.5% claimed by the petitioner is arbitrary, whimsical and much higher than the rate at which similar services were availed by the respondent from other organizations. The claim in the petition is objected to on the ground that there is no ascertained debt payable by the respondent company. The amount claimed by the petitioner is in dispute and the petition is based only on invoices which were not accepted and which cannot be the basis for a winding up petition. Refuting the allegation made in the petition, it is contended that the winding up petition cannot be an alternative for recovery of money for which a civil suit is ordinarily the remedy and the company court cannot be used as a forum by the creditor to establish its rights either regarding the debt or regarding the interest.

8. The respondent company refuted the claim of the petitioner for respondent's winding up on the ground that the respondent does not owe a definite and ascertained amount and the petitioner is not entitled for any interest at any rate. Even in the email sent to the respondent, varied rate of interest had been claimed either @ 8% or 18% and no rate of interest, in any case, was agreed between the parties for the alleged payment due from the respondent to the petitioner. The respondent refuted the allegations that any specific request was made by Mr.Radhakrishnan, Managing Director (Europe) and Mr.Ravi Grewal to recruit 20 personnel for the respondent company's project in Europe. The rates as quoted by the petitioner company were only a proposal which were never accepted as the respondent company had been availing similar services from several other organizations and were paying the standard rate @ 8.33% of annual gross. It is averred that rather, the petitioner had agreed in oral conversation to provide the services @ 8.33% of the annual gross. On the basis of emails sent by the petitioner company, it is contended that there were no consensus *ad idem* between the parties and the fee structure offered by the petitioner company was not accepted. The respondent, however, admitted that Mr.Anand Joshi, Mr.Rami Reddy and Mr.Harsha Bhatnagar were short listed by the petitioner, were appointed by the

respondent company in its project at Prague, Czech Republic and the allegation that these individuals also reported to the respondent company's office at Chandigarh was denied. According to the respondent, these individuals soon after joining the respondent company left the services except Mr.Harsh Bhatnagar and the concern was expressed to the petitioner company about their non-commitment to the work and the replacement were sought for these people which has not been honored by the petitioner company. Relying on an email dated 10th April, 2005, it is contended that the Director of the respondent company had considered the rate of 8.33% for Mr.Uday Kumar, however, when the invoices were received, they were received on a higher rate which were different from what was agreed upon orally between the parties. The petitioner was asked to sent the invoices at the revised rate which has not been done. According to the respondent company, it had agreed to make the payment @ 8.33% of annual gross for Mr.Ankur Aggarwal and Mr.Uday Kumar, however, the petitioner company refused to accept the same. The respondent denied that a notice was duly served with the signatures and seal affixed on the acknowledgment card, as no legal notice was served on the respondent company at Chandigarh where the invoices were raised and sent by the petitioner company. In these circumstances, the

respondent company has sought dismissal of the petition of the petitioner company for winding up of respondent company.

9. An affidavit of Col..T.S. Bakshi (Retd.) has been filed in support of respondent company giving the names and addresses of the Directors of the respondent company and the places where the statutory records including the books of accounts of the respondent company are kept. The respondent also filed the copies of the audited balance sheet for the year 2005-2006.

10. The petitioner filed a rejoinder refuting the averments and pleas raised by the respondent company. The petitioner rather raised a new plea in the rejoinder that there was an oral contract between the parties and since the rates were quoted by the petitioner and the respondent went ahead and availed the services, therefore, there was a deemed acceptance of such rates. Reliance was placed on various correspondences alleging that the respondent has admitted in those correspondences that he is liable to make payments and made false assurances. Relying on Section 8 of the Contract Act, it was contended

that an offer is made subject to a condition that the offeree cannot accept the benefit without accepting the condition and, in the circumstances, it was contended that there is a deemed liability of the respondent to make the payments of the amounts claimed by the petitioner on the basis of invoices. The emphasis was also made on the fact that the legal notice was not replied in which interest was claimed @ 16% from 31st Mach, 2005 till the full payments were to be made to the petitioner and, in the circumstances, it was claimed that the admitted debt is Rs.3,66,416/- from March 2005.

11. The petitioner has relied on (2006) 129 Comp Cas 343 (Madras), Vivek Hire Purchase and Leasing Limited vs. Paisapower.Com P. Ltd to contend that if the Court comes to the conclusion that the dispute sought to be raised is not bonafide and is only manufactured or created for the purpose of resisting the petition, then grant of any relief to such a company is to be declined and such a company should be wound up. The petitioner also relied on (1994) 3 Supreme Court Cases 348, Pradeshiya Industrial & Investment Corporation of U.P. Vs. North India Petrochemicals Ltd. and Another and (1971) 3 Supreme Court Cases 632,

M/s.Madhusudan Gordhandas & Co. Vs. Madhu Woollen Industries Pvt. Ltd. to contend that if the debt is bonafide and where there is no doubt that the company owes the creditor a debt, then this will entitle the creditor to a winding up order even if the exact amount of the debt is disputed and the court will make a winding up order without requiring the creditor to quantify the debt precisely.

12. Per contra, the respondent have relied on 2000 (34) Company Cases Vol. 101 33, United Construction Company vs. Piccadily Agro Indsutries Ltd.; 2004 (001)-CLJ – 481 – MP, Astha Textile Co. Ltd. Hyderabad Vs. Indo Ram Synthetics (I) Ltd., Dhar (M.P.); 1995(083)-COMPCAS-0135-MAD, Elmeh India Vs. Hi-Sound Corder Private Ltd. and (1965) 34 Comp Cases 456 (SC), Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Anr. to contend that, in the facts and circumstances, there are bonafide disputes about the alleged debt claimed by the petitioner in the company petition and the respondent company can not be wound up as it is also solvent and the petition is liable to be dismissed.

13. I have heard the learned counsel for the parties in detail and have perused the petition, reply and the rejoinder and documents filed by the petitioner. The copy of the balance sheet of the respondent company filed for the year 2005-2006 have also been perused and from the balance sheet, it cannot be inferred that the respondent company is insolvent or will be unable to pay its debt to the petitioner company. Though the balance sheet was filed by the respondent company pursuant to the direction of the Court, no reply to the audited balance sheet has been filed nor there is any averment by the petitioner company that from the balance sheet it can be shown that the respondent company is insolvent company or in such a financial state that it will be unable to pay the alleged debt of the petitioner.

14. The petitioner has also taken divergent stands. In the petition, it is contended that since the invoices were sent which were not refuted and were accepted, the amount of invoices is deemed to have been accepted where as in the rejoinder, the stand taken by the petitioner is that there was an oral contract between the parties and since the rates were quoted for providing services and respondent had availed all such services,

therefore, there was a deemed acceptance of such rates. Perusal of the communication referred to by the petitioner especially the email which is at page 43 of the paper book as Annexure 'P3', it is apparent that a proposal was given for person to be recruited who were to be located in India at 12.5% annual gross on CTC basis, and for people located in the rest of world at a flat fee of Rs.1.25 lakh for vanilla skills and 1.75 lakh for premium skills.

15. From the correspondences produced by the petitioner, it is difficult to infer that the parties were *ad idem* in respect of rates payable by the respondent company to the petitioner. Rather from another email which is dated 1st April, 2005 sent at 11.16 am, it is inferable that Vipul, petitioner's representative, had represented that he would consider the rate of 8.33% for people placed in Chandigarh for programmer level. It was also specified that the same rates cannot be agreed for hiring of people for senior level. By the same email, it is apparent that the petitioner company agreed to reduce the rates to 8.33% for Uday Kumar, however, sought clearance of other amounts by 10th April at least. From the plethora of correspondences, emails exchanged between the parties

what emerges is that whether the commission should be 12.5% or 8.33% was not finalized and it cannot be inferred conclusively that the rate agreed by the respondent was 12.5% commission on the annual gross. If the rate at which the payment had to be made was not agreed conclusively, *a fortiori,* it cannot be inferred that the respondent had agreed to pay the amount of invoices raised by the petitioner on the annual gross on CTC basis for the employees, Ankur Aggarwal, Harsh Bhatnagar, Uday Kumar and Rami Reddy and Mr.Anand Joshi. Rather in one of the e-mail, the petitioner representative had agreed to charge 8.33% on annual gross.

16. The invoices raised by the petitioner do not indicate that in case the amount of invoices sent was not paid within a certain time, the respondent shall be liable to pay interest at any particular rate. From the correspondences exchanged between the parties, which is alleged to be the basis for a concluded contract between the parties it also cannot be inferred that the respondent had agreed to pay interest at the rate of 16% per annum as has been demanded by the petitioner company.

17. It has been held in number of cases that an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression unable to pay its debts in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a company. At the stage of admission of the petition, the Court is concerned to see whether the respondent-company has been unable to pay its debts. The amount claimed must be one which is legally due and recoverable debt. The debt must be payable prima facie. The onus to a great extent is placed upon the petitioner to satisfy the Court prima facie. In this regard, to my mind the petitioner has not been able to discharge its primary onus to show that the above debt is rightly due to the petitioner much less that it was an admitted liability. The Court would refuse to admit a petition where there is a bona fide dispute raised by the respondent-company. Once the stand of the respondent-company prima facie is bona fide and is of substance then it would be difficult for the Court to direct admission of such a petition. The Bombay High Court has laid down the fol-

lowing principles in Softsule (P) Ltd., Re, (1997) 47 Company Cases 438:

(Comp Cas pp. 443-44)

> Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make the order.
>
> Secondly, if the debt is bona fide disputed, there cannot be neglect to pay within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.
>
> Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not due within the meaning of Section 434(1)(a) and non-payment of the amount of such a bona fide disputed debt cannot be termed as neglect to pay the same so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.
>
> Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

18. The Madras High Court in Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd, (1993) 3 Company Law Journal 322, (Comp LJ at p. 326) has evolved the following principles relating to bona fide disputes:

> (i) if there is a dispute as regards the payment of the sum towards the principal, however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a civil court;
>
> (ii) the existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to a civil court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding-up proceedings; and
>
> (iii) if there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company.

19 The rules as regards the disposal of winding-up petition based on disputed claims are thus stated by the Apex Court in Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd., (1971) 3 SCC 632. The Supreme Court has held that if the debt is bona fide disputed and the

defense is a substantial one, the court will not wind up the company. The principles on which the court acts are:

> (i) that the defence of the company is in good faith and one of substance;
>
> (ii) the defence is likely to succeed in point of law; and
>
> (iii) the company adduces prima facie proof of the facts on which the defence depends.

20. Generally speaking, an admission of debt should be available and/or the defense that has been adopted should appear to the Court not to be dishonest and/or a moonshine, for proceedings to continue. If there is insufficient material in favour of the petitioner, such disputes can be properly adjudicated in a regular civil suit. It is extremely helpful to draw upon the analogy of a summary suit under Order XXXVII of the Code of Civil Procedure. If the Company Court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction it would have granted unconditional leave to defend, it must dismiss the winding-up petition or if there are such admissions on the basis of which a decree can be passed in favor of the petitioner under Order 12 rule 6 of the Code of Civil Procedure. In M/s.Madhusudan Gordhandas & Co.(*supra*) relied on by the

petitioner, it was held by the Apex Court that if the debt is *bonafide* disputed and the defence is substantial one, the court will not wind up the company. In this case, a creditor had claimed a sum for goods sold to the company and the company had contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. A petition for winding up by a creditor who claims payment of agreed sum for work done for the company when the company contended that the work had not been done properly was disallowed by the Supreme Court. In the present facts and circumstances, the petitioner company is unable to show conclusively that it had been agreed that the respondent company is liable to pay the amount at 12.5% of the annual gross. The respondent company has also raised a dispute that it has taken similar services from other companies at the rate of 8.33% which rate was agreed to be considered by and on behalf of petitioner company, which is apparent from some of the emails. The respondent company has also raised concern about the non-commitment to the work by the persons recommended by the petitioner company and those who left the services of the respondent company, replacement was also sought which was also agreed to be considered by the petitioner. Taking entire facts and circumstances, the defense of the respondent cannot be termed illusory or not *bonafide*.

21 In Pradeshiya Industrial & Investment Corporation of U.P. (*supra)*, it was held by the Apex court that an order under Section 433 (e) is discretionary and the debt claimed by the petitioner against a company whose winding up is sought must be a determined or a definite sum of money payable immediately or at a future date. It was further observed by the Apex Court that the inability referred to in the expression "unable to pay its dues" and Section 433(e) should be taken in commercial sense that is to say that its assets are such and its existing liabilities are such so as to reasonably ascertain that the assets would be insufficient to meet the existing liabilities. Perusal of the balance sheet of the respondent company for the year 2005 and 2006 negate this contention of the petitioner. Rather the petitioner had not even adverted to the financial position of the respondent company on the basis of the balance sheet for the year 2005-2006.

22. In Vivek Hire Purchase and Leasing Limited (*supra*) relied on by the petitioner, a suit was filed by the company for the limited relief, however, the fact shows that the respondent was unable to pay its debt and rather

in one of the communications, the respondent had admitted its inability to pay its debt and in view of that matter it was held that the suit was not a bar to proceeding against the respondent company for winding up. It was held in that case that the defence of the respondent company was not in a good faith and one of substance and was not likely to succeed and no *prime facie* proof of the facts on which the defence depended was made. In contra distinction, the defence of the respondent that there was no consensus *ad idem* between the parties seems to plausible. Though the petitioner has tried to impute the liability on the basis of a concluded contract on the ground that the invoices were raised which were not objected to or protested and so there is a deemed acceptance, however, in the rejoinder, it was stated that there was an oral agreement. In case, there was an oral agreement, the petitioner ought to have substantiated as to what were the exact terms and conditions orally agreed between the parties. The respondent has taken a plea that the petitioner is not entitled for any charges in respect of those persons recommended by the petitioner who left the services of the respondent soon after the joining. Various factors inevitably reflect that the parties, petitioner and respondent, were not *ad idem* in respect of alleged oral agreement. The terms and conditions of oral agreement have not been spelled out by the

petitioner but whatsoever terms can be culled, there does not seem to be consensus with the respondent nor on the basis of correspondence it can be inferred as to what terms of oral agreement were finally settled. On the basis of pleadings only without substantial evidence, the petitioner cannot contend that the amount claimed by the petitioner is definite and ascertained and in the circumstances it is difficult to infer that the defence of the respondent is not bonafide. There is neither admission of debt nor the defense seems to be moon shine and on the basis of alleged deemed admission that is that the respondent did not protest to the invoices raised by the petitioner. From the e-mails exchanged between the parties, even this can not be inferred that the respondent did not protest to the amount claimed by the petitioner in the invoices. As already observed a winding up petition can not be a legitimate means of seeking to enforce payment of debt which is bona fide disputed. When a creditor comes forward with a prayer for winding-up a company on the ground of non-payment of dues, then the creditor has to establish that the debt owed by the company is clear, valid in law, unimpeachable and cannot be disputed.

23. The case relied on by the petitioner (2003) 45 SCL 429 (Calcutta), New Red Bank Tea Co. (P) Ltd. Vs. Jahar Roy is clearly distinguishable from the facts of the case of the respondent. In that case while replying to the statutory notice, debt was not bonafide disputed and the defense taken was not substantial one and all the points of defense was not disclosed initially but was taken for the first time in the affidavit of opposition and it was held that where a defense is disclosed by a company in reply to the notice, then all the points should be disclosed. It was held where the defense is not taken in reply to statutory notice but is taken alternatively in the affidavit, it cannot be accepted that the company's refusal to pay is based on bonafide defense. The case of the respondent is clearly distinguishable inasmuch as this is the case of the respondent company that the notice was not served on the office of the respondent company at Chandigarh where the invoices were raised. Though an AD card has been produced about the service of notice at Delhi address, however, it does not bear any seal of the company and is initialed by someone and no reply to notice was given, not raising all the disputes raised in the reply to the petition. The case of the respondent is different as no reply was filed whereas in the case relied on by the petitioner reply was given but all the defense was not taken in the reply at

the first instance and new defenses were taken in the reply to the petition filed before the Court.

24. In Amalgamated Commercial Traders (P.) Ltd. (*supra*) relied on by the respondent, the Apex Court had held that winding up petition is not legitimate means for seeking to enforce payment of debt which is bonafide disputed by the company. It was held that a petition presented ostensibly for a winding up order but related to exercise pressure should be dismissed. In this case, the debt in respect of which notice was given was bonafide disputed and it was held that the question whether the declaration of dividend dated December 30, 1959 was valid or not raised a substantial question as to interpretation of Section 207 of the Companies Act, 1956 and in the circumstances it was held that there was no neglect to pay within section 434(1)(a) of the Companies Act. In Astha Textile Co. Ltd. Hyderabad (supra), it was held that in case of enforcement of some agreement entered into between the parties, it requires civil adjudication in civil court, i.e., where the rights and obligations of the parties vis-a-vis each other whether they were performed or breached as per the terms of the so called agreement or not requires proper civil adjudication as such

disputes can be decided more appropriately, effectively and suitable by the civil court in a civil suit and not by the Company Court under the Companies Act in winding up petition. It was held that merely because the traders happen to be a company in itself is not a ground to file and entertain a company petition for its winding up. In Elmeh India (*supra)* relied on by the respondent, it was held that the agreement to pay the interest on the basis of oral agreement which was not pleaded in the petition and in respect of which no details were given, there could not be any presumption that for every such loan given or advanced, the interest was payable. In the case of petitioner also though no specific oral agreement has been contended in the petition except that the invoices were raised which were not refuted and were accepted without protest and, therefore, there is a deemed acceptance, there is nothing to show as to how the oral agreement was arrived at between the parties and who were the witnesses in whose presence the oral agreement was arrived at and what were the exact terms and conditions of the oral agreement relied on by the petitioner. From the correspondences, which are emails mainly, the terms and conditions in respect of which there could be consensus *ad idem* between the parties cannot be inferred. In Elmeh India (supra), a single Judge had held that it is not the legislative intent that the company court

should convert itself into a ordinary civil court and proceed to held a trial at the instance of every petitioner claiming to be a creditor of the company nor can proceed to pass a decree and thereafter order the winding up of the company on the ground that it is unable to satisfy the decree. Similarly in United Construction Company (*supra)*, a single Judge had dismissed the petition holding that it was clear from the pleadings that the parties were not *ad idem* in regard to any factum, right from the execution of the alleged agreement till its execution.

25. What will be the ramification of not replying to statutory notice. The respondent has alleged that the notice was not sent at Chandigarh office where the invoices were raised. This is no more *res integra* that where no response to a statutory notice has been made, winding up order must invariable be passed. Where no reply to the statutory notice is given, the respondent company runs a risk of winding up petition being admitted for hearing at the threshold itself. This aspect was dealt with by a single Judge of this Court in Resham Singh & Co P. Ltd. Vs Daewoo Motors India Ltd, 102 (2003) DLT 188 where it was held as under:

" I shall first deal with the consequences of the respondent's failure to send a reply to the statutory notice. The reliance of Mr. Valmiki Mehta, learned Senior Advocate appearing for the petitioner on the above-mentioned decisions of my learned Sister Usha Mehra, J. is somewhat exaggerated. The decisions do not inexorably lead to the conclusion that winding-up orders must unvariably be passed where no response to a statutory notice has been made. From my understanding of the judgment my learned Sister had taken the failure to reply to the notice as an important factor in determining whether a bona fide defence had been put forward. In the circumstances of both the cases, she preferred to view the defence as an after-thought and as being bereft bona fide. In CP 220/2001 entitled H.B. Stock Holdings Ltd. v. Associated Infotech Ltd., I have favoured the opinion that where no response had been made to the statutory notice the respondent company runs the risk of a winding-up petition being admitted for hearing at the threshold stage itself. Normally, the Company Judge consider it prudent in first instance to issue notice to the respondent so that its defence to the possible far-reaching and fatal winding-up orders can be considered. The admission of the petition at its first hearing is possible because, by virtue of Section 434 of the Companies Act, a presumption of the indebtedness can be legitimately drawn by the Court where no reply to the statutory notice is forthcoming. The risk of the admission of the petition, as well as the appointment of a Provisional Liquidator is thus broodingly and ominously present in all those cases where the respondent company neglects to send any reply to the winding-up notice. But this is as far as the danger extends. My attention has been justifiably drawn to the decision of the Single Judge of this Court in Vimco Ltd. v. Sidvink Properties (P) Ltd., 1996 Vol. 86 Company Cases 610, where it has

been held by P.K. Bahri, J. that where a bona fide dispute had been shown to the Court, the question of applying the deeming provision should not automatically arise. I continue to be in respectful agreement with this view. Applying this ratio to the facts of the present case, without in any manner diluting or undermining the significance of the failure of the respondent company to respond to the statutory notice, this factor will be duly kept in perspective when the conspectus of facts is considered."

26. In the totality of facts and circumstances and on the basis of the ratio of various judgments cited by the parties, it is inevitable to infer that the disputes raised by the respondent are bonafide and *prima facie* it is not apparent that there was a concluded contract between the parties and in the circumstances the amount claimed by the petitioner cannot be held to be ascertained. Even there is no agreement for payment of interest nor the rate at which it has been claimed. The copy of balance sheet filed by the respondent company also does not reflect that the respondent company is unable to meet its debt.

27. In the facts and circumstances, the petition for the winding up of the respondent company is without any merit and it is dismissed. However,

considering the facts and circumstances, the parties are left to bear their own cost.

May 14, 2007 **ANIL KUMAR, J.**
'sdp'